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DEC 23

CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1932

No. 565

PHILIP HURN and PERCY MORGAN, JR.

Petitioners

v.

FULTON OURSLER, LOWELL BRENTANO, ALBERT LEWIS and SAM H. HARRIS

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

KEITH LORENZ
JOSEPH LORENZ
LOUIS W. MCKERNAN
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IN THE

Supreme Court of the United States

October Term, 1932

No.

PHILIP HURN and PERCY MORGAN, JR.,
Petitioners,

against

FULTON OURSLER, LOWELL BRENTANO, ALBERT LEWIS and SAM H. HARRIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Philip Hurn and Percy Morgan, Jr., respectfully pray for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree of that Court entered on November 14, 1932. A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith, in accordance with Rule 38 of this Court.

I

Summary and Short Statement of the Matter Involved

Nature of Suit and Decisions Below:

The matter presented to the Circuit Court of Appeals involved a single question of law, namely: whether the United States District Court for the Southern District of New York was without jurisdiction, in a case involving a claim of copyright infringement, which copyright was held to be valid, but not infringed, to consider also in the same suit a claim advanced in good faith, arising out of the same state of facts, for unfair competition and unfair practices, in the absence of diversity of citizenship.

The Circuit Court of Appeals, on November 7, 1932, rendered a *per curiam* opinion affirming a decree of the District Court dismissing the complaint, in the suit brought by the present petitioners (R. 45).

The complaint, with the amendments thereto, is based upon the alleged infringement of a copyrighted play written and owned by the complainants, called "The Evil Hour," by a play written and owned by two of the defendants and produced by all of them, entitled "The Spider," and upon unfair business practices and unfair competition committed against the complainants by the defendants in connection with the preparation and production of "The Spider."

The District Court, after a trial of the claim based upon copyright infringement, decided against the plaintiffs, and thereupon dismissed the complaint, refusing to entertain the allegations based upon claims other than violation of the Copyright Law of the United States, or to admit in evi-

dence any proof thereof, on the ground that, in view of the conclusion reached by it of lack of copyright infringement, it was without jurisdiction to do so (R. 29-30).

The findings of fact show that the complainants had a validly registered copyright upon their play (R. 26-27).

It also appears from the findings that the action was brought by the complainants herein in good faith and not in a fraudulent attempt to give jurisdiction to the District Court, nor with intent to have that Court decide this suit upon local or State questions only (R. 29).

The complaint as amended likewise discloses that the complainants' claim for copyright infringement and the claim of unfair competition and unfair business practices arise out of substantially the same state of facts.

The issue was solely one of jurisdiction. No appeal was taken from the Court's decision with respect to lack of copyright infringement, and the record in the Circuit Court of Appeals as settled by the District Court, included only the complaint, amended complaint, findings of fact and conclusions of law, besides purely formal papers (R. 39-42).

Subject-matter of the Litigation

The complaint as amended alleges that the complainants are the authors of a play called "The Evil Hour," which was copyrighted on or about August 26, 1924 (R. 5, 6). Subsequently, the play was revised; the play as revised was neither copyrighted nor published (R. 67, 68). The play, both in its copyrighted form and as revised, was submitted by complainants to the defendants Lewis and Harris, theatrical producers (R. 67, 68), and Lewis considered and discussed the production of said play (R. 8, 9).

The fundamental, particular and novel feature of the complainants' play, as alleged in the complaint as amended, is the holding of a spiritualistic seance on the stage *with the audience taking part therein,* and *assisting in the detection of a murderer,* supposed to be in the audience. This is accompanied by the use of various spiritualistic devices, manifestations, and trickery, and incidental fear-inducing "business" of a spirit seance (R. 16, 17).

During the period that Lewis had the complainants' play, and was considering its production, the defendants had copyrighted and were producing a play known as "The Spider" (R. 11, 12). "The Spider," as copyrighted and originally produced by the defendants, *contained none of these distinguishing aspects of the complainants' play; in fact, it had no spiritualistic seance of any kind or character* (R. 8). Instead of producing complainants' play, the defendants fundamentally changed the version of "The Spider" as copyrighted and as originally actually produced, appropriated and pirated the fundamental and novel aspects of "The Evil Hour" as above described; and incorporated in their play, not merely the primary idea of the presentation of a spiritualistic seance on the stage, with the audience participating in the seance, and with the purpose of detecting a murderer, supposed to be in the audience, but also introduced a substantial number of scenes, episodes, portions of dialogue and business, substantially identical with similar passages in "The Evil Hour" (R. 8, 12-20).

The complaint further alleges that the play was so produced with full knowledge on the part of the defendants that they had misappropriated and pirated said portions of "The Spider" from "The Evil Hour" (R. 7). These

acts of the defendants irreparably injured the complainants by killing the originality and novelty of the basic ideas of "The Evil Hour" and preventing the production of complainants' play (R. 10). Such action on their part constituted, it is alleged, a violation of the copyright laws of the United States, and unfair business practices and unfair competition as well, and were in violation of complainants' rights at common law and in equity (R. 24). The complainants accordingly asked for an injunction against the continued production of "The Spider" and for an accounting of profits (R. 21).

II

Reasons Relied Upon for the Allowance of the Writ of Certiorari

1. The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with applicable decisions of this Court.

In *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, the Supreme Court of the United States held that the Federal Court had jurisdiction to entertain a counterclaim interposed by the defendant (under Equity Rule 30) based upon *unfair business practices* of the complainant, notwithstanding that the complainant's suit, founded on an alleged violation of the Anti-Trust Laws of the United States, was dismissed on the merits; and notwithstanding also that said violation of a Federal statute constituted the sole ground for Federal jurisdiction. It is believed that the *Moore* case is exactly applicable to the case at bar. It is of no importance that the claim of unfair practices

of which the Court took cognizance in that case was one made by the defendant, rather than by the complainant. Equity Rule 30, moreover, conferred no jurisdiction which the Court otherwise would have lacked.

It has been repeatedly decided by this Court that the presence of a Federal question in a case is sufficient to vest a Federal Court with jurisdiction, and, having acquired it, that Court may decide the case on State or local questions only, even though it should determine the Federal question adversely to the complainants, or find it unnecessary to pass upon such question. This principle has been recognized by a line of decisions exemplified by *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175.

This Court has in patent and registered trade-mark cases refused to consider a claim of unfair competition in the same suit, but *only where the patent or registered trade-mark was invalid.* See *A. Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 201 U. S. 166; *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665.

2. The Circuit Court of Appeals for the Sixth Circuit has rendered a decision upon the issues here involved in conflict with adjudications of the Circuit Court of Appeals for the Second Circuit.

In *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, certiorari denied, 273 U. S. 706, the Circuit Court of Appeals for the Sixth Circuit held, in a suit brought by the complainant based on alleged infringement of a registered trade-mark and on unfair competition, that the District Court had jurisdiction to entertain allegations in the complaint based on unfair competition, even if diversity of citizenship were lacking, despite its conclusion that the complainant's registered trade-mark had not been in-

fringed. The Court expressly recognized in that case that its conclusion was in conflict with decisions of the Circuit Court of Appeals in the Second Circuit.

3. The question raised by this petition presents an important question of Federal law, which should be finally settled by this Court.

Although the principle involved seems to have been directly settled by the Supreme Court in *Moore* v. *New York Cotton Exchange, supra,* and inferentially by *Siler* v. *Louisville & Nashville R. R. Co., supra,* and similar cases, the decisions in the Circuit Court of Appeals for the Second Circuit create a situation which of necessity engenders multiplicity of suits concerning substantially the same facts. In jurisdictions like the Second Circuit, if a complainant in a suit involving a Federal statutory right such as a patent, trade-mark or copyright, desires, in the absence of diversity of citizenship, to rely both on infringement of his Federal right and unfair competition as well, he cannot do so in the State Court, because the latter would have no jurisdiction to determine the issues regarding the infringement of the patent, etc. The Federal Court, on the other hand, disclaims the right to try the unfair competition issue. If in either Court when suit is brought, the complainant loses on the one issue there raised, he necessarily must bring another suit in another forum to vindicate the other claim on which he relies. Where essentially the same facts are involved, this is certainly contrary to public policy. It must be borne in mind that an adjudication that particular facts do not constitute an infringement of a patent, trade-mark or copyright certainly does not determine that they do not constitute unfair competition.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioners be granted such other and further relief as may seem proper.

KEITH LORENZ,
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LOUIS W. MCKERNAN,
Counsel for Petitioners.

New York, N. Y., December 19, 1932.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

There was no opinion of the United States District Court for the Southern District of New York.

The opinion of the Circuit Court of Appeals for the Second Circuit is printed in the record (p. 45) and is not reported.

II

Jurisdiction

1. The date of the decree to be reviewed is November 14, 1932.

2. The decree was rendered in a suit in equity based upon the infringement of a validly registered copyright on a dramatic composition under the Copyright Act of March 4, 1909, as amended, which suit also included a claim based upon unfair competition and unfair practices, arising out of the same facts. Only the latter claim is in issue.

3. The Statute under which the jurisdiction of this Court is invoked is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III

Statement of the Case

The nature of the case is stated in the petition.

IV

Specification of Errors

The errors which the petitioners will urge are that the Circuit Court of Appeals for the Second Circuit erred:

1. In affirming the decree of the District Court dismissing the bill of complaint.

2. In affirming the decree of the District Court for the Southern District of New York, which held that, in view of the conclusion reached by said Court of lack of copyright infringement, it was without jurisdiction to entertain the allegations of the complaint as amended, and to admit any evidence in proof thereof, in so far as the acts of the defendants complained of constituted unfair business practices and unfair competition against the complainants (R. 29, 30).

V

Summary of Argument

The decision of the Supreme Court in *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, is determinative of the issue herein involved. In that case, the defendant was allowed to establish a counterclaim based on complainant's unfair business practices, notwithstanding that the latter's suit, predicated on a violation of the Anti-Trust Laws (upon which Federal jurisdiction was based), was dismissed on the merits. It makes no difference that the claim for unfair practices was made in a counterclaim as distinct from a second cause of action in the complaint.

Equity Rule 30, permitting the interposition of a counterclaim, certainly confers no independent jurisdiction.

The principle of the line of cases exemplified by *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, to the effect that the presence of a Federal question advanced in good faith in a case is sufficient to vest the United States District Court with jurisdiction, and, having acquired it, the case may be decided by that Court on State or local questions only, even though the Federal question should be decided adversely to the complainant, is likewise applicable. In *Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 201 U. S. 166, and *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665, the Supreme Court in *dicta*, has stated that its jurisdiction to hear the unfair competition aspect of patent or trade-mark cases depends on whether or not the patent or trade-mark of the plaintiff *is valid*. The validity of the plaintiff's copyright in the case at bar is undisputed.

The decision herein of the Circuit Court of Appeals for the Second Circuit is directly contrary to that in *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, in the Sixth Circuit.

The record discloses that the invocation of Federal jurisdiction in the present case was not made colorably or in bad faith, and it is clear that the claim of unfair competition and unfair practices rests on substantially the same state of facts as that based on alleged copyright infringement. Under the circumstances, to give effect to the decision of the Circuit Court of Appeals for the Second Circuit is to compel a multiple litigation of practically identical issues.

VI

ARGUMENT

POINT I

The decision of the Supreme Court in *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, is determinative of the issue here involved.

In consideration of the question here at issue, the following points must be borne in mind:

(1) Although the District Court found that there was no infringement of complainants' copyrighted play, there is no dispute about the fact that their play was in fact copyrighted, and so entitled to protection by the Federal Courts. The District Court specifically so found (R. 26, 27).

(2) The invocation of Federal jurisdiction by virtue of the alleged violation of complainants' copyright was not done colorably with the purpose of giving jurisdiction to said District Court over complainants' other claims.

(3) The complainants' claim of unfair competition and unfair business practices arises out of substantially the same state of facts upon which the copyright infringement claim was predicated.

In *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, a suit was brought under the Anti-Trust Laws of the United States, to have the defendant, the New York Cot-

ton Exchange adjudged a monopoly, and to restrain it and others from refusing to install a ticker and to furnish the Odd Lot Cotton Exchange, of which the plaintiff was president, with cotton quotations. The answer set up a counterclaim, pursuant to Equity Rule 30, to the effect that the Odd Lot Cotton Exhange was purloining quotations or receiving them from some person who was purloining them and giving them out to its members, and asked an injunction against the continuance of such unfair practices. Federal jurisdiction was "invoked under the Anti-Trust Laws of the United States." There was no diversity of citizenship. The Supreme Court held that, notwithstanding that the complaint was properly dismissed on the ground that no case was made under the Federal Anti-Trust Laws, an injunction nevertheless should be granted on the counterclaim. Objection was specifically made that, in view of the dismissal of the complaint, there was no jurisdiction over the counterclaim. The validity of this contention was denied by this Court. The Court, per Mr. Justice SUTHERLAND, said (p. 609):

> "Two classes of counterclaims thus are provided for: (a) One 'arising out of the transaction which is the subject-matter of the suit,' which must be pleaded, and (b) another 'which might be the subject of an independent suit in equity,' and which may be brought forward at the option of the defendant. We are of opinion that this counterclaim comes within the first branch of the rule; and we need not consider the point that, under the second branch, Federal jurisdiction independent of the original bill must appear, as was held in Cleveland Engineering Co. *v.* Galion Dynamic Motor Truck Co. (D. C.) 243 Fed. 405, 407."

The Court said further (p. 610):

> "The counterclaim sets up that, nevertheless, appellant is purloining or otherwise illegally obtaining them, and asks that this practice be enjoined. 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are in all particulars, the same as those constituting the defendant's counterclaim. Compare Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 390-394. And see generally, Cleveland Engineering Co. *v.* Galion Dynamic Motor Truck Co., *supra*, p. 408 (243 Fed.); Champion Spark Plug Co. *v.* Champion Ignition Co. (D. C.) 247 Fed. 200, 203-205."

The question involved is one of jurisdiction. A counterclaim is, of course, in the same category as an original suit. The Court had no independent jurisdiction over said counterclaim. Its jurisdiction depended solely on its power to hear the Federal claim as set forth in the complaint.

Equity rule No. 30 certainly did not enlarge the jurisdiction of the Federal Court, it merely stated a rule of practice (See *Cleveland Engineering Co.* v. *Galion D. H. Truck Co.*, 243 Fed. 405, 407; *Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635). If the Federal Court has *power* to hear a *counterclaim* solely on the basis of the jurisdiction of the Court over the Federal matters raised by the complaint, certainly it must have the same power to entertain claims arising out of the same subject-matter when comprising a part of the plaintiff's claim, provided, of course, that jurisdiction in the first instance is properly vested in that Court.

On the question of the *power* of the Court, it would seem that the principle which this Court followed in the *Moore* case is equally applicable in the instant case.

In the present case, there is no doubt that the claims based on unfair competition and copyright infringement arise out of the same transactions.

It is interesting to note that the Circuit Court of Appeals has specifically applied the doctrine of the *Moore* case. In *Dickinson Tire & Machine Co.* v. *Dickinson, et al.*, 29 Fed. (2d) 493 (Circuit Court of Appeals for the Second Circuit), a suit was brought in the State Court and removed to the Federal Court, such removal being upheld on the ground that it was a cause "arising under the patent right or copyright laws of the United States." A counterclaim, arising out of the same subject matter, was interposed in said suit. *Notwithstanding that the patent suit was decided adversely to the complainant*, and that no independent action could have been brought in the Federal Court on the counterclaim, the Circuit Court of Appeals sustained a judgment in favor of the defendant

based on the counterclaim. The Court said, per SWAN, *C. J.* (p. 495):

> "Consequently there is no doubt that the court had jurisdiction of the original bill. *Its jurisdiction to decide the counterclaim arising out of the subject matter of the suit is equally clear.* See *Moore* v. *New York Cotton Exchange*, 270 U. S. 593."

POINT II

The principle of *Siler* v. *Louisville & Nashville Railway Co.* is likewise applicable to the present case where Federal jurisdiction is acquired by an alleged violation of the copyright law, and where the claim of unfair competition and unfair practices arises out of the same general state of facts as the alleged copyright violation.

It has been repeatedly decided by the Supreme Court of the United States that the presence of a Federal question in a case is sufficient to vest a Federal Court with jurisdiction, and, having acquired it, that Court may decide the case on State or local questions only, even though it should determine the Federal question adversely to the complainant, or find it unnecessary to pass upon such question.

In *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, the claim was made that the promulgation by a State Railway Commission of certain rates were in violation of the Federal Constitution. The Supreme Court held that the Commission had no authority under the State statute to promulgate said rates. The Court said (p. 191):

> "The Federal questions, as to the invalidity of the State Statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit

Court jurisdiction, and having properly obtained it, that Court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

"This Court has the same right, and can if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming that benefit. Homer *v.* United States (No. 2), 143 U. S. 570, 576; Tallbrook Irrigation Dist. *v.* Bradley, 164 U. S. 112, 154; Penn Mutual Life Insurance Co. *v.* Austin, 168 U. S. 685, 694; Burton *v.* United States, 196 U. S. 283, 295; Williamson *v.* U. S., 207 U. S. 425; People's Savings Bank *v.* Layman, 134 Fed. Rep. 635; Michigan Railroad Tax Cases, 138 Fed. Rep. 223."

The Supreme Court, in applying the said principle, has either passed upon the State questions only, without a consideration of the Federal questions, as in the *Siler* case, or has passed upon both the State and Federal questions.

Louisville & Nashville R. R. Co. v. *Quin,* 235 U. S. 601, 604;

Ohio Tax Cases, 232 U. S. 576, 587;

Southern R. R. Co. v. *Watts,* 260 U. S. 519, 522;

Green v. Louisville & Interurban R. R. Co., 244 U. S. 499, 522;

Michigan Central R. R. v. *Vreeland,* 227 U. S. 59, 63, 64.

It has been held that the principle of the *Siler* case is applicable to cases involving alleged infringements of trade-marks or patents, and unfair competition as well, subject to the limitations in most cases that (a) the Federal jurisdiction must have been invoked in good faith,

(b) the patent or trade-mark relied upon must be valid, and (c) the unfair competition aspect of the case must arise out of substantially the same state of facts as the alleged patent infringement. The three elements in the present case above noted, come within the scope of these limitations. There is, of course, no difference where the question involves a copyright as distinct from a trade-mark or patent. The Supreme Court in a number of cases has in *dicta* supported the principle above set forth.

In *A. Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 201 U. S. 166 (1905), the complaint set forth an alleged infringement of complainant's trade-mark and also stated facts showing unfair competition by the defendant. The Supreme Court held that the Federal Court had no jurisdiction because the complainant's trade-mark based primarily on a distinctive color was not valid, but said (p. 172):

> "Nor can we assume jurisdiction if this case as one wherein the defendant had made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. *Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark, valid under the Act of Congress, and for the reasons above given, we think it has not.*"

The same principle seems to have been announced in *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665, where the Court said (p. 677):

> "It is to be observed however that the question we are considering is not whether this record makes out a case of false representation or perfidious dealing, or unfair competition, but whether appellant

> had the exclusive right to use the word 'Elgin' as against all the world. Was it a lawfully registered trade-mark? *If the absolute right to the word as a trade-mark belonged to appellant then the Circuit Court had jurisdiction under the statute to award relief for infringement, but if it were not a lawfully registered trade-mark* then the Circuit Court of Appeals correctly held that the jurisdiction could not be maintained."

It is interesting to note that it appears that in the briefs submitted by counsel in the Supreme Court in connection with both of the above cases, no contention of jurisdiction based upon a claim of unfair competition was made.

The excerpts from these Supreme Court decisions have been cited as *dicta,* of course. In the *Leschen* and *Elgin* cases the respective trade-marks relied upon were held invalid and the Court decided that *therefore* it had not jurisdiction as to the unfair competition aspects of those cases. The determination of the validity of the trade-mark in the first instance is a prerequisite to jurisdiction. The necessary inference from the language quoted is that if the validity of the trade-marks had been sustained, the Court would have had jurisdiction over the unfair competition aspect of the cases as well. Otherwise, the language would have no pertinence. If the Federal Court *in no event* would have jurisdiction over the claims based on unfair competition, it was wholly superfluous to state that there was no jurisdiction *by virtue of the invalidity of the trade-marks.* It would have been sufficient to say that there was no diversity of citizenship. This is particularly true as the language in question was used in connection with the question of jurisdiction over the unfair competition aspects in those suits.

Whether or not the *valid* trade-mark or patent was actually infringed is of no more importance than the question in the *Siler* case of whether or not the constitutional right invoked had actually been violated.

A full discussion of the principles and authorities appears in the case of *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, certiorari denied, 273 U. S. 706. In that case the Circuit Court of Appeals for the Sixth Circuit held in a suit based on alleged infringement of a registered trade-mark and on unfair competition, that the District Court had jurisdiction to entertain allegations in the complaint based on unfair competition, even if diversity of citizenship were lacking, despite its conclusion that the complainant's registered trade-mark had not been infringed.

The Circuit Court of Appeals in its memorandum in the present case cites in support of its decision *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446. In that case, the Court considered the *Leschen* case and quoted the extract from the opinion therein above set forth. This case was discussed in the *Vogue* case, *supra,* as follows (p. 994):

> "So, also, we are now cited to Standard Co. *v.* Trinidad Co., 220 U. S. 446, 31 S. Ct. 456, 55 L. Ed. 536; but that case is not helpful here. The point decided was that, where there was diverse citizenship in a case based upon a registered trade-mark and unfair competition, the jurisdiction of the District Court was not so entirely dependent on the diverse citizenship, even after a decision that the registry was invalid, so as to make the decision of the Circuit Court of Appeals final under sections 128 and 241 of the Code, being Comp. St. Secs. 1120, 1218 (in their then current form). The implications as to what would have been the result, if there had been no diverse citizenship, are too indefinite for positive application here."

There exists no good reason why a plaintiff who has a claim based upon violation of a patent or violation of a copyright and another claim founded on unfair competition should be required to bring several suits. If he wishes to rely upon both grounds, he cannot avoid the necessity of two suits by suing in the first instance in the State Court. If he follows that course, the State Court will, of course, refuse to entertain the suit based on infringement of the patent or copyright, because of lack of jurisdiction. It will be remembered that a given set of facts, although not sufficient to satisfy the technical requirements necessary to show an infringement under the Copyright Law, may nevertheless establish those elements of unfairness required to prove unfair competition. The weighty considerations in favor of the elimination of a multiplicity of suits need no repetition here. But the public policy involved becomes of almost irresistible force when, as in the case at bar, the lower Court's decision in this case requires, not merely the prosecution of several litigations, but, as the subject-matter of the suits and the proof to be adduced are substantially identical, a multiple litigation of *practically identical* issues.

CONCLUSION

For the foregoing reasons, this Court should grant the petition of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

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